Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc. *and* Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 12-CA-9849

March 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on September 17, 1981, by Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint and notice of hearing on October 2, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 2, 1981, following a Board election in Case 12-RC-5972, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 20, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 14, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 19, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain but challenges the union certification on the basis that the Board erred in certifying the Union as the exclusive bargaining representative of Respondent's employees. In the Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case, and, also, that no factual issues warranting a hearing are presented in this case.

Our review of the record herein, including the record in Case 12-RC-5972, discloses, *inter alia*, that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted among the employees of the stipulated unit on January 9, 1981, and that the tally of ballots furnished the parties showed 10 votes cast for and 9 votes cast against the Union. There were three challenged ballots, a number sufficient to affect the results of the election. On February 9, 1981, the Regional Director issued his report on challenged ballots and recommendations to the Board in which he recommended that the ballots of Leroy Crosland and Frank W. Harper, Jr., be opened and counted but that the challenge to the ballot of J. Alton Horning be sustained. In so recommending, the Regional Director concluded that Horning, though not a supervisor as suggested in the challenge to his ballot, did not share a community of interest with the other employees in the unit.

Respondent filed both a request for reconsideration of the report on challenged ballots with the Regional Director and a request for remand with the Board. On February 25, 1981, the Regional Director issued a supplemental report on challenged ballots and recommendation to the Board. The supplemental report, based in part on the Regional Director's consideration of an affidavit from Horning submitted by Respondent, again sustained the challenge to Horning's ballot. Respondent filed exceptions to the supplemental decision. On June 10, 1981, the Board issued its Decision and Direction,

[1] Official notice is taken of the record in the representation proceeding, Case 12-RC-5972, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

adopting the Regional Director's recommendations with regard to the challenged ballots. Accordingly, on June 22. 1981, the ballots of Crosland and Harper were opened and counted.

The revised tally of ballots then issued showing a majority of votes cast for the Union. On July 2, 1981, the Regional Director issued a Certification of Representative to the Union.

In July 14, 1981, by letter, the Union requested that Respondent meet and bargain collectively with it. On July 20, 1981, Respondent refused to bargain with the Union. On August 31, 1981, again by letter, the Union renewed its request that Respondent meet and bargain with it. Respondent again refused on September 10, 1981.

In its answer to the complaint, Respondent admits that it has refused to bargain collectively with the Union whose certification it disputes. In addition, Respondent offers three affirmative defenses. First, it argues that it was denied due process of law when it was not afforded a full hearing concerning the challenged ballots. Respondent maintains that it raised material and substantial issues of fact not addressed by the Board. Secondly, Respondent maintains that the Board departed from precedent in adopting the Regional Director's findings and recommendations which were based on an investigation that was itself arbitrary and capricious. Finally, Respondent claims that the Board abused its discretion in failing to review a record containing all evidence received and generated by the Regional Director. Respondent reiterates these arguments in its response to the order transferring the proceeding to the Board and Notice To Show Cause.

We find no merit in Respondent's claim of denial of due process. The record before the Board in Case 12-RC-5972 raised no material issue of fact or law to warrant a hearing. The affidavit submitted by Respondent with its request for reconsideration similarly raises no issue which would warrant a hearing. In this regard Horning's affidavit merely set forth facts primarily concerning nonwork-related casual contacts with unit employees, and failed to give any evidence that Horning's work was sufficiently related to that of unit employees so as to warrant Horning's inclusion in the unit.

After thorough examination of Respondent's exceptions and exhibits attached thereto, we find, in agreement with the Regional Director, that Respondent has presented insufficient evidence to establish a *prima facie* case that J. Alton Horning is eligible to vote. *Reichart Furniture Company* v. *N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981); *Revco D. S. Inc.* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981).

As for Respondent's contention concerning the failure to review all evidence received and generated by the Regional Director, we stress that statements of witnesses which were before the Regional Director in his disposition of election objections and challenged ballots were expressly excluded from the definition of "documentary evidence" in Section 102.69(g)(1)(ii) of the Board's Rules and Regulations, as amended on September 14, 1981. The exclusion of such statements accords with our policy of protecting investigatory affidavits from disclosure when the witnesses have not testified at a hearing. The Supreme Court upheld this policy in *N.L.R.B.* v. *Robbins Tire Co.*, 437 U.S. 214 (1978). Therefore, a party which wants the Board to consider statements of witnesses must append them to its submission to the Board pursuant to Section 102.69(g)(3) of the Board's Rules.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc., is a Florida corporation and is engaged in the wholesale sale and distribution of meats from its office and place of business located at 2292 Sand Lake Road, Orlando, Florida. During the past 12 months, a representative period, Respondent has purchased and received goods and supplies valued in excess of $50,000 directly from points located outside the State of Florida.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All delivery drivers and warehousemen employed by Respondent at its Orlando, Florida, warehouse; but *excluding* office clerical employees, casual employees, mechanics, dispatchers, technical employees, guards and supervisors as defined in the Act.

2. The certification

On January 9, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 12, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 2, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 14, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 20, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 20, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All delivery drivers and warehousemen employed by the Employer at its Orlando, Florida warehouse; but *excluding* office clerical employees, casual employees, mechanics, dispatchers, technical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 2, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 20, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Knickerbocker Foods, Inc., a division of Knickerbocker Meats, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive bargaining representative of its employees in the following appropriate unit:

> All delivery drivers and warehousemen employed by the Employer at its Orlando, Florida, warehouse; but *excluding* office clerical employees, casual employees, mechanics, dispatchers, technical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Orlando, Florida, warehouse copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that copies of said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employ-

ees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All delivery drivers and warehousemen employed by the Employer at its Orlando, Florida, warehouse; but *excluding* office clerical employees, casual employees, mechanics, dispatchers, technical employees, guards and supervisors as defined in the Act.

KNICKERBOCKER FOODS, INC., A DIVISION OF KNICKERBOCKER MEATS, INC.